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No. 759

IN THE

Supreme Court of the United States

THE FRANKLIN LIFE INSURANCE COMPANY, *Petitioner*

vs.

R. A. STUART, JR., AND TRINITY BOND INVESTMENT CORPORATION, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF

To The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

Petitioner prays that a Writ of Certiorari issue to review the decree of the Circuit Court of Appeals for the Fifth Circuit entered February 18, 1948, in Cause No. 11,800 styled R. A. Stuart Jr., et al vs. The Franklin Life Insurance Company, reversing with directions the decree of the District Court of the United States for the Northern

District of Texas, Ft. Worth Division, entered August 9, 1946.

OPINION BELOW

The opinion of the Court below filed February 18, 1948, is not yet reported and for convenience it is printed in an appendix to the brief filed with this petition. There was no additional opinion on the motion for rehearing.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Acts of February 13, 1925, 43 Stat. 938. (28 U. S. C. A. Section 347-a).

The opinion of the Circuit Court of Appeals was filed February 18, 1948; petition for rehearing was filed March 8, 1948; petition for rehearing was denied March 12, 1948, without additional opinion. Pursuant to stipulation of the parties, an order staying the mandate for thirty days pending the application for Writ of Certiorari to this Court was entered March 22, 1948.

QUESTIONS PRESENTED

There are three important questions presented in this petition. They are:

One: Whether the contract of a corporation may be avoided by it on the ground of the lack of authority of

the agent who signed the contract on behalf of the corporation, even though the authorized officials of the corporation made a direct representation holding out the agent as having authority to make the contract.

Two: Whether the alleged contract of a corporation may be avoided on the ground of lack of authority of the agent who signed the contract on behalf of the corporation, even though the corporation accepted the contract, partially performed it, and has never repudiated it.

Three: Whether the opinion of the Circuit Court of Appeals for the Fifth Circuit in this case is a purely legal construction of the alleged contract between the litigants or whether said opinion amounts to a substitution by the Circuit Court of Appeals of its own fact findings for the fact findings of the Trial Judge which had ample evidence to support them.

SUMMARY STATEMENT

In this action, when we consider the practical application of the opinion of the Circuit Court of Appeals for the Fifth Circuit in the light of the facts recited therein, the Court has held that a corporation may escape liability upon its contracts by denying the authority of an agent to bind the corporation, even though the corporation has respresented that the agent had authority to negotiate the contract, and the corporation has accepted the contract, partially performed it, and never repudiated it.

This action was brought in the State Court of Texas by R. A. Stuart, Jr. and Trinity Bond Investment Corporation against The Franklin Life Insurance Company to recover $10,000.00 earnest money deposited by the plaintiffs with the defendant in connection with plaintiffs purchase of 56,245 acres of fee land accompanied by an assignment of 55,215 acres of State leases known as the Apache Ranch in the State of Arizona for an agreed consideration of $225,000.00. The action was removed to Federal Court on the ground of diversity of citizenship. A judgment in the United States District Court that the plaintiffs take nothing against the defendant was entered August 9, 1946. The Trial Court made specific findings of fact, both in the judgment (R. 7-8) and in two written opinions (R. 127-141).

So far as it is pertinent to this Petition for Certiorari, plaintiffs' complaint in the Court below sought the recovery of the $10,000.00 earnest-money deposit on the ground that the plaintiffs' contract for the purchase of the Apache Ranch was never approved by the proper agents of the defendant corporation. (R. 2-4). This issue was joined in the defendant's answer. (R. 4-7).

In a preliminary written opinion, the Trial Court found:

> "The plaintiff is seeking to get out of a contract * * * * and he decided to get out of the contract on account of, not failure at that time on the part of the defendant, but just decided he had made a bad

trade and he wanted to get relieved of it. Now it resolves itself into a question whether there were such loop holes, you might say, in the application, which ultimately became the contract between them, as will enable him to be relieved of his obligation to take the land." (R. 127-128).

In the final judgment, the Trial Court found:

"1. That plaintiffs and defendant entered into a contract for the sale of 56,245 acres of deeded land and the transfer of 55,215 acres of leases from the State of Arizona from defendant to plaintiffs on November 13, 1945, which contract provided that if the plaintiffs failed to perform, the defendant might retain $10,000.00 earnest money deposited with defendant by plaintiffs as liquidated damages for the breach.

"2. That the defendant used all reasonable diligence and substantially performed all provisions of such sales contract.

"3. That there was available to plaintiffs title insurance of the kind and character contemplated by the parties at the time the contract was signed, but the plaintiffs, without just cause, refused to accept such title insurance.

"4. That the plaintiffs breached the contract.

"5. That the $10,000.00 specified by the sales contract was intended to be liquidated damages and not a penalty or forfeiture, and that said sum was a reasonable amount for liquidated damages." (R. 7-8).

The Court's conclusion was that The Franklin Life Insurance Company was entitled to retain the $10,000.00

earnest-money deposit as liquidated damages for the breach of the contract by plaintiffs.

More extended findings are contained in the opinions of the Trial Court. (R. 127-141). The Circuit Court of Appeals wrote an opinion to the effect that C. L. McDonald could not approve the contract on behalf of The Franklin Life Insurance Company because he was not at the Home Office in Springfield, Illinois, and that by reason thereof the Company had never made a contract. The judgment of the Trial Court was reversed and the cause was remanded for further proceedings not inconsistent with the opinion. (See copy of opinion attached to brief accompanying this petition.)

REASONS FOR GRANTING THE PETITION

The Circuit Court of Appeals for the Fifth Circuit has decided an important question of law of the State of Texas, contrary to the settled law of said State.

An analysis of the opinion of the Circuit Court of Appeals reveals that the opinion has provided a ready method by which corporations may repudiate contracts made in good faith with agents of the corporation, notwithstanding the principles of estoppel arising from apparent authority or the principles of ratification which are presented by the facts of this case. If the opinion of the Circuit Court of Appeals is permitted to stand, Corporations doing business in Texas will be provided with

an absolute defense to a suit upon many contracts from which the corporation desires to withdraw. This conclusion necessarily follows the reasoning of the Circuit Court of Appeals for the Fifth Circuit in the instant case. The Franklin Life Insurance Company has never attempted to repudiate its contract for the sale of the Apache Ranch to the respondents. The validity of the contract is attacked by the respondents, who can attack it only on the basis of a want of mutuality arising from the premise that the contract has no binding force against The Franklin Life Insurance Company. Consequently, the only real basis for the opinion of the Circuit Court of Appeals, is a holding which ignores the principles of ratification, and the holding out of the agent's authority.

The importance of the question cannot be denied when the Court considers the fact that every corporation must act solely through its agents, and a corporation doing business over a wide geographical area must depend upon a great number of agents to transact its business properly. If the public cannot rely upon the apparent authority of those agents, or upon a specific representation of authority, no one can safely deal with a corporation unless he transacts his business at the directors' table.

The failure of the Circuit Court of Appeals for the Fifth Circuit to follow the settled law of the State of Texas upon questions presented by this petition is evidenced by the following authorities:

Manhattan Life Insurance Co. vs. Stubbs, 234 S. W. 1099;

Sealy Oil Mill & Mfg. Co. vs. Bishop Mfg. Co., 235 S. W. 850;

Galveston-Houston Interurban Land Co. vs. Dow, 193 S. W. 353;

Kincheloe Irrigation Co. vs. Hahn Bros. & Co., 146 S. W. 1187;

Aransas Pass Harbor Co. vs. Manning, 63 S. W. 627;

Rogers Hill & Co. vs. San Antonio Hotel Co., 23 S. W. (2) 329.

Moreover, although the Circuit Court of Appeals attempts to base its reversal of the trial court's judgment upon a legal construction of the sales contract, a proper analysis of the facts shows that the Court has merely substituted its own fact finding for that of the trial court. The trial court's finding is amply supported by the portion of the Record cited in the brief accompanying this Petition. The action of the Circuit Court of Appeals in setting aside the findings of the trial Judge is such a departure from the accepted and usual course of judicial proceedings as to justify the exercise of the Supreme Court's powers of supervision.

This petition is accompanied by a brief (bound with this petition) supporting the legal propositions set out herein.

WHEREFORE, it is respectfully submitted that this petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

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SUPPORTING BRIEF

Subject Index

TABLE OF CASES

No.

IN THE

Supreme Court of the United States

THE FRANKLIN LIFE INSURANCE COMPANY, *Petitioner*

VS.

R. A. STUART, JR., AND TRINITY BOND INVESTMENT CORPORATION, *Respondents*

BRIEF

To The Honorable The Supreme Court of The United States:

1.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is not yet reported and for convenience is printed as an appendix to this brief. There was no additional opinion on the motion for rehearing.

JURISDICTION

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Acts of February 13, 1925, 43 Stat. 938. (28 U.S.C.A. Section 347-a).

STATEMENT OF THE CASE

This action was brought in the State Court of Texas by R. A. Stuart, Jr., and Trinity Bond Investment Corporation against The Franklin Life Insurance Company to recover $10,000.00 earnest money deposited by the plaintiffs with the defendant in connection with the plaintiff's purchase of 56,245 acres of fee land, accompanied by an assignment of 55,215 acres of State leases known as the Apache Ranch in the State of Arizona for an agreed consideration of $225,000.00.

The action was removed to the Federal Court on the ground of diversity of citizenship. A judgment in the United States District Court that the plaintiffs take nothing against the defendant was entered August 9, 1946. The Trial Court made specific findings of fact, both in the judgment (R. 7-8) and in two written opinions (R. 127-141). The Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the Trial Court on February 18, 1948, and remanded this action for further proceedings not inconsistent with its opinion.

So far as it is pertinent to this Petition for Certiorari, plaintiffs' complaint in the Court below sought the re-

covery of the $10,000.00 earnest-money deposit on the ground that the plaintiffs' contract for the purchase of the Apache Ranch was never executed as a binding contract by the defendant corporation. (R. 2-4). This issue was joined in the defendant's answer. (R. 4-7).

The contract in controversy was filled in on a printed form designated as an Application to Purchase Land. All negotiations leading up to the making of the contract were conducted by R. A. Stuart, the father of R. A. Stuart, Jr., and President of the plaintiff, Trinity Bond Investment Corporation, and C. L. McDonald, Manager of the Texas Real Estate and Loan Department of the defendant, The Franklin Life Insurance Company. E. H. Henderson, a real estate broker, participated in the negotiations.

There was practically no dispute concerning the facts leading up to the execution of the contract. The dispute arose after the plaintiffs tried to withdraw or back out of the contract.

In the negotiations leading up to the execution of the contract, R. A. Stuart, Sr., who was acting on behalf of both plaintiffs, offered to pay $225,000.00 for the Apache Ranch upon terms not essential to this inquiry. McDonald transmitted this offer by telephone to B. G. Harrison, Vice President of The Franklin Life Insurance Company, at Springfield, Illinois. Harrison, who was a member of the Finance Committee, immediately called a meeting

of the Committee, which Committee is charged by the By-laws of The Franklin Life Insurance Company with the responsibility and power to sell the Company's lands, (R. 114) and the Committee approved the sale at the price of $225,000.00, provided Mr. Stuart would agree to certain changes with respect to the payment of the money. Between 5 and 6 PM on November 13, 1945, Harrison telephoned McDonald, who was in the office of R. A. Stuart, and advised McDonald of the action of the Finance Committee. With McDonald acting as go-between, the terms were discussed with Harrison and Stuart, and Stuart acceded to the change in payment as required by the Finance Committee. Harrison then authorized McDonald to make the contract and sign it on behalf of the Company. After the telephone conversation was completed, McDonald took four blank printed forms called Application to Purchase and dictated material to be filled in the blanks to Mr. Stuart's Stenographer. McDonald then presented them to Stuart. Stuart took the forms and inserted a clause relating to title insurance. Then the printed form fixing the time allowed for title examination was changed by Stuart from ten days to thirty days.

The contract as thus prepared was signed by Stuart for the plaintiffs and by McDonald for The Franklin Life Insurance Company. (Stuart's testimony R. 31-33; McDonald's R. 71-78; Henderson's R. 62-66 and Harrison's R. 97-101).

As indicated, the dispute arose after The Franklin Life Insurance Company started performance of the contract and after Stuart made a second trip to Arizona and concluded that the land was worth only $150,000.00 and not the $225,000.00 which he had contracted to pay for the land. There was no evidence the land was not worth $225,000.00. Upon ample evidence, the Trial Court found:

> "The plaintiff is seeking to get out of a contract * * * * and he decided to get out of the contract on account of, not failure at that time on the part of the defendant, but just decided he had made a bad trade and he wanted to get relieved of it. Now it resolves itself into a question of whether there were such loop holes, you might say, in the application, which ultimately became the contract between them, as will enable him to be relieved of his obligation to take the land." (R. 127-128).

In the final judgment, the Trial Court found:

> "1. That plaintiffs and defendant entered into a contract for the sale of 56,245 acres of deeded land and the transfer of 55,215 acres of leases from the State of Arizona from defendant to plaintiffs on November 13, 1945, which contract provided that if the plaintiffs failed to perform, the defendant might retain $10,000.00 earnest money deposited with defendant by plaintiffs as liquidated damages for the breach.
>
> "2. That the defendant used all reasonable diligence and substantially porformed all provisions of such sales contract.

"3. That there was available to plaintiffs title insurance of the kind and character contemplated by the parties at the time the contract was signed, but the plaintiffs, without just cause, refused to accept such title insurance.

"4. That the plaintiffs breached the contract.

"5. That the $10,000.00 specified by the sales contract was intended to be liquidated damages and not a penalty or forfeiture, and that said sum was a reasonable amount for liquidated damages." (R.7-8).

The Trial Court found the parties made a contract. The Circuit Court made a finding of fact stated as a conclusion of law that The Franklin Life Insurance Company did not accept the offer to buy the ranch.

Apparently the Trial Court's finding of fact was based upon the testimony of the two members of the Finance Committee that the contract was approved at the Home Office in Springfield, Illinois, and that by telephone conversation, they directed and authorized McDonald to accept the contract in Stuart's office in Fort Worth, Texas. The Trial Court, of course, considered the testimony of McDonald as the go-between in the discussions between Harrison of the Finance Committee and Stuart representing the plaintiffs. The Trial Court also considered the testimony of Stuart and the real estate broker, Henderson.

While a printed portion of the contract provided:

"It is understood that this application does not constitute an agreement binding upon the Company

> until finally approved at the Home Office in Springfield, Illinois,"

it did not require that the contract be executed in the Home Office in Springfield. Immediately following the foregoing excerpt, the form provided:

> "Notice of acceptance may be in the form of a letter signed by any duly authorized officer or direct representative of the Company, mailed to me at the address stated above and deposited in any post office or mail box in time to be stamped by the post office which receives it within twenty (20) days from the date hereof."

It was developed in the testimony that while Stuart was considering the contract and while McDonald was still in telephone connection with Harrison, that Stuart stated he was interested in other property and wanted an immediate answer without waiting for the contract to be sent to the Home Office and without waiting for the lapse of the twenty days provided in the contract, whereupon McDonald said on the telephone, "Mr. Harrison, Mr. Stuart tells me he is interested in other property and he wants an answer now," and Mr. Harrison replied, "All right, fix up your contract and sign it for the Company." Mr. McDonald then turned to Mr. Stuart and said, "Mr. Stuart, you understand that I am authorized to sign this contract for the Company." Mr. Stuart said, "Yes." (McDonald's testimony R. 76; Harrison's testimony R. 100).

The Finance Committee, authorized by the Company's By-laws to sell the Company's properties, approved the sale in a meeting in Springfield, Illinois, which was full compliance with the terms of the application and the Trial Court so found. McDonald was a direct representative of the Company and the Circuit Court so conceded, but found that he was not at the Home Office. Harrison, a member of the Finance Committee, was at Springfield in the Home Office when he auhorized McDonald to approve the contract.

McDonald approved the contract in the following language written thereon and below the signatures of the plaintiffs:

> "The foregoing application is approved and accepted for and on behalf of The Franklin Life Insurance Company, this 13th day of November, 1945." (R. 17).

It is obvious that the provision requiring approval of the contract at the Home Office was to make certain that ordinary real estate brokers would not have authority to enter into a final contract on behalf of the Company. McDonald was manager for the Company over a large territory and was certainly a direct representative of the Company as distinguished from Henderson, who was the real estate broker in the transaction. While McDonald was not at the Home Office when he approved the contract, Harrison was in the Home Office at Springfield

when he and the other members of the Finance Committee approved the contract and Harrison was at the Home Office when he telephoned McDonald authorizing McDonald to accept the contract. (R. 100).

The Circuit Court did not discuss the Trial Court's finding of fact, nor did it discuss the effect of such finding. It seized upon a printed sentence of the form to support its legal conclusion no contract ever existed.

In making its finding that there was no contract, the Circuit Court substituted its finding of fact for that of the Trial Court. The Circuit Court held in effect the contract of a corporation may be avoided on the ground of lack of authority of the agent who signed the contract on behalf of the corporation, even though the corporation accepted the contract, partially performed it, and has never repudiated it. The effect of the Circuit Court's holding is that a corporation may avoid a contract on the ground of the lack of authority of its agent who signed the contract on its behalf, even though the authorized officials of the corporation made a direct representation holding out the agent as having authority to make the contract. It is thus apparent that the Circuit Court has substituted its own fact findings for the fact findings of the Trial Judge, which were supported by ample evidence.

SPECIFICATIONS OF ERROR

1.

The Circuit Court of Appeals erred in setting aside the fact finding of the Trial Judge and substituting its own findings to the effect that there was no contract between the parties because although the printed form of sales contract provided for approval thereof at the Home Office of The Franklin Life Insurance Company, the undisputed testimony shows that on November 13, 1945, the minds of the parties met as to the terms of the sale; that the Finance Committee of The Franklin Life Insurance Company approved said terms and agreed thereto, and in a telephone conversation relayed to R. A. Stuart, acting for plaintiffs, held out McDonald as having authority to accept and execute the contract on behalf of The Franklin Life Insurance Company, and having so represented to the plaintiffs, The Franklin Life Insurance Company thereupon became bound to the contract when McDonald executed it for the Company.

2.

The Circuit Court of Appeals erred in holding that it was necessary for C. L. McDonald to be physically present in Springfield, Illinois, before his signature on the contract of sale would be effective to bind the Company.

3.

The Circuit Court of Appeals erred in holding that notice of the action of the Finance Committee approving the contract in a meeting in the Home Office of The Franklin Life Insurance Company was not effective when reported to Stuart via the telephone conversation through C. L. McDonald and that it could not be effective until contained in a confirmatory letter to Stuart.

4.

The Circuit Court of Appeals erred in holding that R. A. Stuart's subsequent request for a confirmatory letter could affect the valid binding confirmation of the contract made by action of the Finance Committee and executed on its behalf by C. L. McDonald on November 13, 1945.

BRIEF OF ARGUMENT

It is believed that the errors of the Circuit Court can best be demonstrated by stating propositions of law in support thereof followed by argument. Accordingly, petitioner submits the following propositions of law.

1.

Where, as in this case, the Trial Court's findings of fact were supported by ample evidence, the Circuit Court

of Appeals should not disturb those findings even though there was some evidence contradictory of the evidence upon which the Trial Court's findings were based.

2.

Where, as in this case, an offer to purchase lands contemplated that acceptance by the seller corporation was to be made at the Home Office of the corporation and the evidence disclosed that the Finance Committee of the corporation, which had the responsibility of selling the lands, held a meeting at the Home Office and accepted the offer, it is not material how notice thereof is given to the buyer where all the circumstances showed the buyer had actual notice of the acceptance.

3.

Where, as in this case, an offer to purchase lands contemplated that acceptance by the seller corporation was to be approved at the Home Office of the company and the Finance Committee of the selling corporation which had the responsibility of selling the lands held a meeting at the Home Office and accepted the offer and the Committee then held out to the buyer that its agent in Texas had authority to sign a contract the corporation became bound to the contract when such agent executed it on behalf of the corporation.

4.

Where, as in this case, an offer to purchase lands contemplated that acceptance by the seller corporation was to be made at the Home Office of the corporation and that notice of such acceptance might be made in the form of a letter, signed by any duly authorized officer or direct representative of the company and mailed to the buyer and the evidence shows that acceptance was made at the Home Office of the company and that notice of the acceptance was endorsed, in writing, on the offer by a direct representative in the office of the buyer, then it was not necessary that a letter be mailed out of the Home Office.

5.

Where, as in this case, a corporation owning lands through action of its Finance Committee having the responsibility of selling said lands, accepts an offer to buy said lands and represents to the buyer that a named direct representative of the company has authority to accept and sign a contract on behalf of the company, a binding contract is made when such agent does so, since the corporation would be estopped to deny the authority of the agent.

ARGUMENT

The Trial Court found the parties entered into a contract. The Circuit Court made a finding of fact that

The Franklin Life Insurance Company never executed the contract. This action was a substitution of a finding of fact by the Circuit Court for a controlling finding of fact by the Trial Court on ample evidence.

In order to show clearly that the Circuit Court has substituted its finding of fact for that of the Trial Court, Petitioner, at the risk of some repetition, calls attention to the evidence as to the preparation of the contract and the signing thereof by the parties involved.

R. A. Stuart, Sr., an attorney of Fort Worth, Texas, President of the plaintiff, Trinity Bond Investment Corporation, one of the Respondents, and father of R. A. Stuart, Jr., the other Respondent, was in his office following a trip to Arizona where he had inspected the Apache Ranch, owned by Petitioner, which had been asking $250,000.00 for the ranch, when he offered $225,000.00 for the ranch. The offer was made to C. L. McDonald, Manager of the Texas Real Estate and Loan Department of Petitioner, The Franklin Life Insurance Company.

After some discussion as to the terms of payment and some other matters, McDonald transmitted the offer by telephone to B. G. Harrison at his office in Springfield, Illinois. Harrison was Vice Prisident and Treasurer of Petitioner, a member of its Finance Committee and Manager of its Real Estate and Loan Department. Mr. Harrison then convened the Finance Committee and the Committee accepted the offer of $225,000.00 for the

ranch. (McDonald's testimony, R. 71-78, and Harrison's deposition, R. 97-100).

Harrison then called McDonald at Mr. Stuart's office and made known to him the action of the Finance Committee. While McDonald was still in telephone connection with Harrison, he repeated to Stuart Mr. Harrison's statement that the Finance Committee had accepted the offer to purchase. Stuart told McDonald he was considering purchase of another ranch and wanted an immediate decision. McDonald repeated the statement to Mr. Harrison, who then authorized McDonald to prepare and execute a contract on behalf of the Company on the terms of Stuart's offer.

The contract was prepared with four copies and executed, Stuart signing for the purchasers and McDonald signing for the seller. One copy of the contract was handed to Stuart, one copy to E. H. Henderson, the real estate broker in the transaction, and two copies retained by McDonald. The meeting broke up with all parties believing that a contract had been made.

The Trial Court considered all of the evidence. It considered the evidence of Harrison and Lutz, members of the Finance Committee of Petitioner which made the decision to accept the offer and authorized McDonald to execute a contract for the Company. In weighing the testimony of Mr. Stuart, the Trial Court considered his testimony to the effect that a short time after he agreed

to pay $225,000.00 for the ranch he made a second trip to Arizona and after getting additional information concluded the ranch was worth only $150,000.00. The Trial Court found Stuart thereupon began trying to get out of the contract. In this connection, the Court stated as a finding:

> "And the peculiarity of it is, and there is no question about that, that the plaintiff Stuart made up his mind that he had made a bad trade on the very day, so he testified. But defendant claims that the contract was entered into. Plaintiff claims that it was not entered into. And he decided to get out of the contract on account of, not failure at that time on the part of the defendant, but just decided he had made a bad trade and he wanted to get relieved of it. Now it resolves itself into a question of whether there were such loop holes, you might say, in the application, which ultimately became the contract between them, as will enable him to be relieved of his obligation to take the land.
>
> "His first point is that the contract was never approved by the defendant. Another fact, what we call a direct agent of The Franklin Life Insurance Company authorized to, did sign the contract. But there was a provision in the application that the contract was to be approved by the head office, I believe that was the wording. The record is that the finance committee of the company had authority over such matters and they actually approved it.
>
> "I find that the contract was actually entered into by both parties and that The Franklin Life Insurance Company has always wanted to carry out the con-

tract, and used reasonable diligence throughout to carry it out. And as I said in the beginning, that Stuart at all times was seeking to be relieved of the contract." (R. 128).

Without discussing any of the testimony and without even considering the testimony of Harrison and Lutz, members of the Finance Committee of the Petitioner, the Circuit Court approached the problem in this manner:

"Appellants argue that no contract ever existed because their signed offer to purchase was never accepted according to its terms. They contend that McDonald's signature could not bind the appellee, since his authority to sign was oral, and that the formal acceptance by Mr. Lutz varied the terms of the offer and so was a mere counter-offer which was never in turn accepted by appellants. If a contract did exist, they contend, then appellee breached it by failure to provide the abstracts of title within the time set by the contract and because title insurance satisfactory to appellants could not be written.

"Appellee on the other hand, insists that binding contract was entered into and signed by the parties on November 13, 1945. Appellee takes the position that McDonald's signature as its agent authorized to sign the contract by one of appellee's officers talking on the telephone from the home office, constitutes a valid acceptance of the offer, and that the subsequent letter of Mr. Lutz was only a confirmation of that acceptance. The changes suggested in that letter, appellee argues, were infact not changes required by it, but merely clarifying amendments.

"Whether or not McDonald's authority to sign for the insurance company was required to be in writing,

we think is not the question determinative of the case. Printed in the offer itself (paragraph 5) was the clear requirement of a written acceptance from the home office to be signed by 'any duly authorized officer or direct representative of the company.' Although McDonald was a 'representative of the company,' he was not at the home office. In the light of the evidence, this might seem to be a quibble were it not for the fact that appellants' request for written final approval by the home office put the appellee upon notice that appellants' understanding of the contract was that such a letter was required by the terms of the contract. Since those terms were used by appellee on its own form, they must be construed most strongly against it. So contrued, a written acceptance from the home office was required, and this being so, acceptance which varied the terms of the offer was no acceptance." (C. C. Op.)

The Circuit Court then stated:

> "It is true that an acceptance may contain a request for certain changes in the terms of the offer and yet be a binding acceptance."

The Court, however, appears to have wholly overlooked and refused to give any consideration to the testimony of Mr. Lutz, who wrote the letter of approval in which it is contended a counter-offer was made. Lutz testified by deposition that he did not intend to make any change in the contract. He further testified that his inclusion of the language

> "subject further to the addition thereto as outlined in the supplemental agreement for dated November 15, 1945,"

as included in the letter was desirable as a clarification of the provision in the Application Agreement with respect to the assignment of leases. He also testified that he included this statement for the reason that he thought Stuart had agreed to the clarification and that he wanted his approval to go both to the original agreement and to the clarification which Stuart had agreed to. In his language:

> "I was simply identifying the agreement, and, in order to describe it, referred to the clarifying supplement which I assumed was agreeable and had been signed. *The agreement was, infact, whatever document the parties had executed on November 13, 1945.*" (R. 110).

The Circuit Court conceded that an acceptance of an offer may contain a request for certain changes and yet be a binding acceptance. In his letter, Lutz did not even ask for the change. He merely undertook to approve changes which he thought that Stuart and McDonald, who had been authorized to act for the Company, had theretofore agreed to, and he was placing his approval on both the original agreement and the clarification agreement, if any, made by Stuart and McDonald. The Trial Court took Lutz' statement as to his intentions in the letter of approval. It is just as reasonable to say that the letter approves both the original agreement and the suggested clarifying statement as it is to say that there was a counter or conditional proposal. If the statement

was ambiguous, then Lutz' statement of his intentions would be controlling. It should also be kept in mind that when Stuart was asking for this letter of approval, he was trying to get out of the contract and trying to find fault with it. It should also be remembered that when Stuart was making the contract, he wanted it to become effective immediately. When he was trying to get out of the contract, he was contending that it had never been effective. The Trial Court had the responsibility of determining what the parties agreed to at the initial meeting. The Trial Court found that the parties entered into a contract which became effective immediately.

The Circuit Court states that Stuart put the company upon notice that he wanted a letter of approval from the Home Office, but the Court overlooks that he put the company upon notice at a time when he was trying to get out of the contract and not at the time the contract was being made. Why did he accept the contract which had been executed by McDonald? Why did he not let his copy and the the other three copies of the contract be sent to the Home Office for immediate approval? It is evident that he considered the contract was effective when McDonald signed it.

Let's consider the matter from another angle. The printed provision now relied upon by Stuart provided that the application would not constitute an agreement binding upon the Company until finally approved at the

Home Office of the Company in Springfield, Illinois. The purpose of McDonald's telephone conversation to Mr. Harrison about noon November 13, 1945, was for the purpose of getting a decision from the Home Office. Harrison convened the Finance Committee, obtained a decision of approval, and authorized McDonald to execute the contract. Harrison then 'phoned McDonald while he was still in Stuart's office and authorized McDonald to make the contract. McDonald and Stuart together then prepared the contract and McDonald and Stuart executed it.

Now the form does not require that notice of acceptance be by letter only. The printed provision says that notice of acceptance may be by letter—not that it must be by letter only. There is no question but that McDonald was a direct representative of the company as distinguished from E. H. Henderson, the real estate broker. McDonald put his approval on the contract, in writing, for the contract carries this endorsement:

> "The foregoing application is approved and accepted for and on behalf of The Franklin Life Insurance Company, this 13th day of November, 1945. (Signed) C. L. McDonald, Manager Real Estate and Loan Department."

Other evidence considered by the Trial Court but overlooked by the Circuit Court was that the contract provided that the Company should have 20 days from acceptance in which to furnish an abstract, and Stuart was

to have 30 days in which to examine the abstract. The contract was dated November 13, 1945, and provided:

> "The buyer and seller each agree to use due diligence and his best efforts to complete this transaction around December 15, 1945."

If the Company was to have 20 days in which to accept and 20 days more in which to furnish an abstract and Stuart was to have 30 days in which to examine the abstracts, then the parties did a vain and foolish thing by inserting a provision that they would use their best efforts to close the transaction by December 15, 1945. It is evident that Stuart considered the contract effective upon signing; otherwise, he would not have signed an agreement to use his best efforts to close the transaction in 32 days when he knew, as a lawyer, it would take some time to furnish him with a supplemental abstract and he had asked an enlargement of time in which to examine the abstracts. Petitioner respectfully submits that the Trial Court was justified in finding that a contract was entered into and the Circuit Court of Appeals has gone beyond correct procedure in substituting its finding of fact that no contract was entered into.

Borden Farm Products vs. Ten Eyck, 297 U. S. 251 80 L. Ed. 669;

Great Atlantic & Pac. Tea Co. vs. Grosjean, 301 U. S. 412, 81 L. Ed. 1193;

Alabama Power Company vs. Ickes, 302 U. S. 464, 82 L. Ed. 374.

The plaintiffs contended in the Trial Court and in the Circuit Court of Appeals that McDonald's lack of authority was not because he failed to write a letter mailed out of Springfield, Illinois, but because his authority from the company was oral via telephone from Harrison at Springfield. Plaintiffs were contending that this authorization from Harrison to McDonald was insufficient to meet the Arizona Statute of Frauds. The Circuit Court held that whether McDonald's authority to sign for the insurance company was to be in writing was not controlling, but did hold that it was necessary that written approval be mailed from Springfield, Illinois. Since plaintiffs' only hope to recover the $10,000.00 earnest-money deposit was based on McDonald's lack of authority, it is proper to determine whether the Company was bound, even though McDonald did not have actual authority.

The decision of the Circuit Court of Appeals in holding the only way the Company could give approval to the contract was by writing a letter of approval out of the Home Office is contrary to Texas law. *Manhattan Life Insurance Company vs. Stubbs*, 234 S. W. 1099. An endowment policy was issued by the Manhattan Life Insurance Company providing for the payment of $5000.00 plus accrued dividends at maturity. The policy stated on its face:

> "In the distribution of surplus or apportionment of dividends where the policy calls therefor, the principles and methods then in use by the company in its determination of the amount apportioned to any policy issued upon this application shall be, and are hereby adopted and accepted. * * * * No statements or promises of any agent of the company, unless written upon this application, shall be binding upon the company, nor shall any alteration of, or addition to, the terms and conditions contained in the application or the policy be binding, unless in writing and signed by the president or secretary."

The general agent who issued the policy, who was the company's southwestern representative, represented to the assured that the dividends on the policy would amount to between $1200.00 and $1300.00 at maturity. When the policy matured, the company offered the assured $5000.00 face value plus $90.19 represented to be accrued dividends. The assured refused to accept the payment on the policy and sued for $5000.00 plus a dividend of $1215.00, represented to be correct dividend by the general agent at the time the policy was issued, plus statutory penalties, interest and costs. The company pleaded the lack of authority, the provisions of the apllication and the policy, and denied any knowledge of the representations made by its general agent.

In giving the assured judgment for the full amout of his claim, the Court held that the general agent had apparent authority to quote dividend figures to a prospec-

tive assured; moreover, that the company was chargeable with knowledge of everything in its general agent's files and that the insurance company, having accepted the premiums with knowledge of its agent's representations, was estopped to deny his authority to make them.

If we apply these general principles to the facts of this case, we find that the case differs only in the lack of any general authority inherent in C. L. McDonald as manager of the Real Estate and Loan Department of The Franklin Life Insurance Company for the State of Texas. That lack of general authority is replaced, however, by a direct and specific representation of B. G. Harrison, Vice President and Treasurer and a member of the Finance Committee of the company holding out McDonald as a person clothed with the power to contract for the sale of this particular ranch to the plaintiffs.

That power and authority has never been repudiated nor questioned by any act of any officer of the company. Both Harrison and Lutz, members of the Finance Committee of The Franklin Life Insurance Company, testified that they approved the contract and authorized McDonald to make it. Only when Lutz was called upon for a letter of approval was any reference made to the clarifying amendment. Moreover, Lutz testified that he was approving the contract as made November 13, 1945, and that he assumed the clarifying agreement was a part thereof. There is nothing in his testimony to indicate

that he intended to make any change in the original agreement made by McDonald.

The Circuit Court of Appeals conceded that an acceptance of an offer may contain a request for certain changes in the terms of the offer and yet be a binding acceptance if it is clear that the acceptaince is unequivocal and that the acceptance will stand even though the changes are not made. In this case, Lutz was not attemptiong to make a change but attempting to approve the original agreement and also to approve what he assumed was a clarifying amendment thereto. It is submitted that the contract became effective and was binding on the company and being binding on the company, there was no lack of mutuality. See *Kincheloe Irrigation Co. vs. Hahn Bros. & Co.*,146 S. W. 1187;*Sealy Oil Mill & Mfg. Co. vs. Bishop Mfg. Co.*, 235 S. W. 850.

Plaintiffs' most favorable position upon this issue of authority is that the question of existence of apparent authority was a question of fact for the jury or court. *Fort Worth National Bank vs. Harwood*, 229 S. W. 487. However, the Trial Judge found that The Franklin Life Insurance Company entered into the contract by action of its Finance Committee in Springfield, Illinois, and the telephoned authority by Harrison to McDonald to sign the contract at Fort Worth.

CONCLUSION

We believe Petitioner has demonstrated:

1. The Circuit Court of Appeals has substituted a finding of fact that the contract was not entered into by the parties for a finding of fact by the Trial Judge that the Finance Committee did accept the offer to buy the ranch and gave McDonald authority to actually sign the contract of sale.

2. That the evidence unquestionably discloses that Stuart was satisfied with McDonald's authority on November 13, 1945, when the contract was signed by all the parties, but that he became dissatisfied with McDonald's authority after he concluded that he had agreed to pay $75,000.00 more than the ranch was worth. (There was no evidence that the ranch was not worth $225,000.00).

3. If the decision is permitted to stand, much mischief will be done to Texas law. It is predicted that if this decision is permitted to stand, it will prove a source of great embarrassment to the Circuit Court of Appeals whenever the Court is called upon to require a corporation to fulfill its obligations arising from contracts made by corporate agents. If a person who contracts with a corporation can avoid his obligations because of his assertions that the agent with whom he dealt has no power to bind the corporation, then no corporation contract

would have any binding effect unless the contracting parties met in the directors' room and contracted with the directors duly assembled in regular meeting in accordance with the by-laws of the corporation. To so hold unduly circumscribes the commercial activities of the whole nation. If this decision is permitted to stand corporations domiciled in other states can do business in Texas and expect to repudiate a large percentage of their contracts when it becomes desirable to do so.

The petition should be granted and the case reversed.

Respectfully submitted,

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APPENDIX

OPINION OF THE CIRCUIT COURT

(February 18, 1948.)

Before SIBLEY, WALLER, and LEE,
Circuit Judges.

Lee, Circuit Judge: This is an action brought in the State Court of Texas by appellants, plaintiffs below, to recover $10,000 earnest money deposited with their offer to purchase of appellee, defendant below, a tract of land in Arizona containing 56,245 acres fee land, and State grass leases of 44,215 acres, more or less. The action was removed to the United States District Court for the Northern District of Texas, on the ground of diversity of citizenship.

On the 13th of November, 1945, appellants, in Fort Worth, Texas, signed an application to purchase certain lands and grass leases in Arizona from the appellee. The application, in the form of an offer, was made upon a printed form provided by the appellee, which contained among others the following provisions (we number them for convenience):

> (1) "In addition to a deed to the 56,245 acres of deeded land, you are to assign to me grass leases on 55,215 acres owned by the State of Arizona, leases to bear on annual rental of 3 per cent per annum.

(2) "If title insurance on said property, under what is known as owner's policy, that is satisfactory to purchasers cannot be obtained upon titles to said property, then, at the purchaser's option, this contract may be nullified, in which event the earnest money herein deposited shall be returned to purchasers. Title insurance, if obtainable, shall be at the purchaser's expense.

* * * * * * *

(3) "It is agreed that you are to have 20 days from this date in which to accept this offer. If this offer is not accepted by you within said period of time, the earnest money deposited with you is to be promptly returned to me. If this offer is accepted and the sale consummated, the earnest money is to be applied as part of the purchase price of said land, but if I should fail to perform as herein specifed, then said earnest money is to be retained by you as liquidated damages.If earnest money is paid by check, the check may be collected without constituting an acceptance of this offer.

* * * * * * *

(4) "You are to furnish abstract of title to said land within 20 days after acceptance of this offer and I agree either to accept title as shown by said abstract or to return said abstract to you within 10 (30) [sic] days from receipt thereof, with a written statement of any material objections which I may have to the title shown by said abstract. * * *

* * * * * * *

(5) "* * * it is understood that this application does not constitute an agreement binding up-

on the company untill finally approved at the home office of the company in Springfield, Illinois. Notice of acceptance may be in the form of a letter signed by any duly authorized officer or direct representative of the company, mailed to me at the address stated above and deposited in any post office or letter box in time to be stamped by the post office which receives it within 20 days from date hereof.

* * * * * * *

(6) "The buyer and seller each agree to use due diligence and his best efforts to complete this transaction around December 15, 1945."

The offer was endorsed, "approved and accepted for and on behalf of the Franklin Life Insurance Company, this 13th day of November, 1945. (Signed) C. L. McDonald, Mgr., Texas Real Estate and Loan Department." McDonald was appellee's Texas agent, and his authority to sign this application for appellee was given over the long distance telephone by B. J. Harrison, of Springfield, Ill., vice-president and treasurer of appellee. This application, or offer, was forwarded to appellee's home office in Springfield, Ill., and on November 15, one Lutz, another vice-president of appellee, telephoned McDonald to say that two points in the application needed qualification: those dealing with the title insurance and the rent from the leased lands mentioned in the first and second paragraphs of the application. Appellee asked that the phrase in the first paragraph reading, "leases to bear an annual rental of 3 per cent per annum," be changed to read, "now

bearing three cents per acre," and the phrase, "said assignment to be made subject to approval of the Arizona State Land Commission" added; and that the phrase in the second paragraph, "owner's policy that is satisfactory to purchaser," be changed to read, "title insurance by financially strong and reputable title insurance company." These requested amendments were written out by McDonald in the form of a letter dated November 15, 1945, addressed to appellee and given to appellants to sign. Appellants never signed the letter. On November 23, appellants told McDonald that they wished to have a letter from appellee's home office formally accepting their offer to purchase. On November 26, in answer to this request, vice-president Lutz wrote the following letter which appellants received in due course:

"Dear Mr. Stuart:

"Mr. McDonald has stated that you have requested a letter from our home office confirming our acceptance of the sale to you of the above ranch.

"This letter will confirm our acceptance of your offer to purchase, according to and subject to the terms of your application to purchase agreement dated November 13, 1945, and subject further to the additions thereto as outlined in the supplemental agreement form dated November 15, 1945.

"With best wishes we are

"Yours truly,
"HENRY M. LUTZ,
Vice-President."

No abstracts of title were ever delivered to appellants, but abstracts down to date of April 1925 were delivered on December 5 for account of appellants to the Phoenix Title & Trust Co. for examination by it with a view to insuring the title. The trust company could not, of course, make an up-to-date report until the latter abstracts were sent to it. They wrote appellants of the situation, and, upon receipt on December 8 of their letter, appellants wrote to McDonald saying that certain conditions, which they specified, made it impossible to carry out the terms of the contract; and on December 11 they demanded return of the $10,000 earnest money. Appellee having refused to return the money, appellants brought suit. Judgment was rendered for the appellee, and appellants appeal to this court. Their first specification of error, and the only one we need to consider, is that the lower court erred in holding that there existed a valid, binding contract between the parties.

Appellants argue that no contract ever existed because their signed offer to purchase was never accepted according to its terms. They contend that McDonald's signature could not bind the appellee, since his authority to sign was oral, and that the formal acceptance by Mr. Lutz varied the terms of the offer and so was a mere counter-offer which was never in turn accepted by appellants. If a contract did exist, they contend, then appellee breached it by failure to provide the abstracts of title

within the time set by the contract and because title insurance satisfactory to appellants could not be written.

Appellee on the other hand, insists that a binding contract was entered into and signed by the parties on November 13, 1945. Appellee takes the position that McDonald's signature as its agent authorized to sign the contract by one of appellee's officers talking on the telephone from the home office, constitutes a valid acceptance of the offer, and that the subsequent letter of Mr. Lutz was only a confirmation of that acceptance. The changes suggested in that letter, appellee argues, were in fact not changes required by it, but mere clarifying amendments.

Whether or not McDonald's authority to sign for the insurance company was required to be in writing, we think is not the question determinative of the case. Printed in the offer itself (paragraph 5) was the clear requirement of a written acceptance from the home office to be signed by "any duly authorized officer or direct representative of the company." Although McDonald was a "representative of the company", he was not at the home office. In the light of the evidence, this might seem to be a quibble were it not for the fact that appellants' request for written final approval by the home office put the appellee upon notice that appellants' understanding of the contract was that such a letter was required by the terms of the contract. Since those terms were used by appellee on its own form, they must be con-

strued most strongly against it. So construed, a written acceptance from the home office was required, and this being so, acceptance which varied the terms of the offer was no acceptance. It is true that an acceptance may contain a request for certain changes in the terms of the offer and yet be a binding acceptance. "So long as it is clear that the meaning of the acceptance is positively and unequivocally to accept the offer, whether such request is granted or not, a contract is formed." *Williston on Contracts*, § 79, and *Restatement of the Law of Contracts*, A. L. I., §§ 38 and 60. Here, the use of the words "and subject further to" indicates not a suggestion but a requirement. The change required in the second paragraph of the offer dealing with an insurer of the title is unimportant. Appellants' dissatisfaction, if any, could not be unreasonable; hence appellee's substituted phrase, "financially strong and reputable" does not essentially change the terms of the offer. But the change relative to the rental of the leased lands is, as appellants claim, a substantial alteration of the terms of the offer, and it effectively prevents the printed acceptance from being more than a counter-offer. We hold, therefore, that there was no valid contract, and that appellants are entitled to the repayment of the earnest money.

In these circumstances, we need not consider the other points raised by the appellee.

The judgment appealed from is reversed, and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED.